Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) v Peguam Negara Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-386–07 OF 2019
KAMARDIN HASHIM, LEE SWEE SENG AND AZIZAH NAWAWI JJCA
27 AUGUST 2020

Administrative Law — Judicial review — Application for — Appellant applied for judicial review against respondent's decision — Decision by respondent to refuse to give consent to appellant to initiate proceeding for purpose of appointing additional or new trustee in public charitable trust — High Court dismissed application — Appeal against decision — Whether refusal of respondent was irrational and/or unreasonable — Whether appellant's appeal ought to be allowed

This was an appeal by the appellant ('applicant') against the decision of the learned judicial commissioner of the High Court ('the learned JC') in dismissing the applicant's judicial review application under O 53 of the Rules of Court 2012. The applicant's judicial review proceedings was directed against the refusal of the respondent to give consent under s 9 of the Government Proceedings Act 1956 ('the Act') to initiate a proceeding for the purpose of appointing an additional or a new trustee in the public charitable trust of Liam Hood Thong Chor Seng Thuan Pulau Pinang ('the association'). One Cheah Leong Kean, deceased ('the testator') had executed a will and codicil and a trust deed wherein the testator had bequeathed four pieces of land and cash to the amount of RM15,000 for the construction of a Pagoda on the lands and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the Pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the Deity Liam Hood Tong Chor Seng Tuan. Since the death of the testator the initial trustees had failed to carry out the building of the Pagoda as per the terms of the trust and the sums of money had been used up completely. On 20 August 1982 an order declaring the lands to be a public charitable trust was handed down and that the principles of the cy-pres doctrine be applicable. Since that order, the lands had been vested in the names of Robert Teng Lye Hock, So Miau Song, Tai Chong, Yeow Teow Giap and Tan Siew Joo ('the existing trustees'). In the 35 years that have lapsed since the order, there had been no effort taken by the existing trustees to carry out the wishes of the testator or by way of cy-pres and the lands had been left vacant. The association had endeavoured to secure funding from third parties to build the said Pagoda.

However as a precondition of the said promised funding, the association needed to be appointed as a trustee, to provide it with the necessary legal standing to execute agreements on behalf of the said trust. Hence, vide letters the association applied to the Attorney General of Malaysia ('the AG') for consent under s 9 of the Act so that an application could be made to the High Court for the association to be made a trustee in addition to or to replace the existing trustees. The AG vide a letter had refused to give his consent on the grounds that consent had been previously given to the existing trustees. Aggrieved by decision of the AG, the association filed the judicial review application for an orders of certiorari and mandamus. The learned JC had dismissed the applicant's application and hence this appeal.

Held, dismissing the appeal with cost of RM8,000:

(1) The AG's decision in refusing consent was reasonable and rational and was made in full compliance of the law. The applicant had failed to prove mala fide motive on the part of the AG in refusing his consent under s 9 of the Act. The learned JC had correctly made the finding that the AG's decision was rational and reasonable. It was clear and imperative for the applicant to get the recommendation of the existing trustees before a new or additional trustee could be appointed with the consent of the AG as the secretary. The applicant had failed to obtain that recommendation, thereby the AG had rightly rejected the application for consent under s 9 of the Act. Therefore, there was nothing unreasonable or irrational as to why consent was not given by the AG (see paras 26–27 & 31).

(2) There was no evidence at all to show that the existing trustees had committed any misconduct. The learned JC had misconceived the law when His Lordship held that the society registered under Trustee Act 1949 did not fall within the ambit of s 9 of the Act and contravened the law of public charitable trusts. However, if the applicant became the trustee, then the trust land will be owned and controlled by the society for its members and not for the public at large who profess the religion of Buddhism (see paras 32–33).

(3) The intention of the legislature in framing s 9 of the Act was to empower the AG in the protection of charitable trust from abuse and to prevent proceedings affecting the charity funds. The contemplated proceedings by the applicant, other than to remove the existing trustees, was also to transfer the said lands from individual trustees to society, which would definitely affected the charity funds which did not fall within the ambit of s 9 of the Act. There was nothing unreasonable or irrational on the part of the AG not to grant consent, as such consent was previously granted to the existing trustees. There was no unreasonableness or irrationality in the decision of the AG to refuse consent. The decision of the learned JC

in not allowing the applicant's application for judicial review was in accordance with the principle of the law, justice of the case and fairness (see paras 39 & 42).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('pemohon') terhadap keputusan pesuruhjaya kehakiman yang bijaksana Mahkamah Tinggi ('PK yang bijaksana') dalam menolak permohonan semakan kehakiman pemohon di bawah A 53 Kaedah-Kaedah Mahkamah 2012. Prosiding semakan kehakiman pemohon diarahkan terhadap penolakan responden untuk memberikan izin di bawah s 9 Akta Prosiding Kerajaan 1956 ('Akta') untuk memulakan prosiding dengan tujuan untuk melantik pemegang amanah tambahan atau baru dalam amanah kebajikan awam Liam Hood Thong Chor Seng Thuan Pulau Pinang ('persatuan'). Cheah Leong Kean, si mati ('pewasiat') telah melaksanakan wasiat dan kodisil serta surat ikatan amanah di mana pewasiat telah mewariskan empat bidang tanah dan wang tunai berjumlah RM15,000 untuk pembinaan Pagoda di tanah dan jumlah tambahan RM5,000 yang akan dilaburkan dan pendapatan yang timbul dari pelaburan tersebut untuk digunakan untuk melenggarakan Pagoda untuk kepentingan semua penyembah yang menganut agama Buddha dan menjalankan adat agama Buddha Dewa Liam Hood Tong Chor Seng Tuan. Sejak kematian pewasiat, pemegang amanah awal gagal menjalankan pembangunan Pagoda sebagaimana terma amanah dan wang telah habis digunakan sepenuhnya. Pada 20 Ogos 1982, satu perintah yang menyatakan tanah-tanah tersebut menjadi amanah kebajikan awam telah dikeluarkan dan prinsip-prinsip doktrin cy-pres adalah terpakai. Sejak perintah itu, tanah tersebut terletak pada nama Robert Teng Lye Hock, So Miau Song, Tai Chong, Yeow Teow Giap dan Tan Siew Joo ('pemegang amanah sedia ada'). Dalam 35 tahun yang berlalu sejak perintah itu, tidak ada usaha yang diambil oleh pemegang amanah sedia ada untuk melaksanakan kehendak pewasiat atau dengan cara cy-pres dan tanah-tanah tersebut dibiarkan kosong. Persatuan telah berusaha untuk mendapatkan dana daripada pihak ketiga untuk membina Pagoda tersebut. Namun sebagai prasyarat pendanaan yang dijanjikan tersebut, persatuan harus dilantik sebagai pemegang amanah, untuk memberikannya kedudukan undang-undang yang diperlukan untuk melaksanakan perjanjian atas nama amanah tersebut. Oleh itu, melalui surat persatuan memohon kepada Peguam Negara Malaysia ('PN') untuk izin di bawah s 9 Akta supaya permohonan boleh dibuat ke Mahkamah Tinggi agar persatuan itu dijadikan pemegang amanah sebagai tambahan kepada atau untuk menggantikan pemegang amanah sedia ada. PN melalui surat telah menolak untuk memberikan izin dengan alasan bahawa izin sebelumnya telah diberikan kepada pemegang amanah sedia ada. Terkhilaf dengan keputusan PN, persatuan memfailkan permohonan semakan kehakiman untuk perintah certiorari dan mandamus. PK yang bijaksana telah menolak permohonan pemohon dan oleh itu rayuan ini.

Diputuskan, menolak rayuan dengan kos RM8,000:

(1) Keputusan PN untuk menolak izin adalah wajar dan rasional dan dibuat dengan mematuhi undang-undang sepenuhnya. Pemohon telah gagal membuktikan motif mala fide pihak PN dalam menolak izin di bawah s Akta. PK yang bijaksana telah membuat keputusan dengan tepat bahawa keputusan PN adalah rasional dan wajar. Adalah jelas dan mustahak bagi pemohon untuk mendapatkan perakuan pemegang amanah sedia ada sebelum pemegang amanah baru atau tambahan dapat dilantik dengan izin PN sebagai setiausaha. Pemohon gagal mendapatkan perakuan tersebut, oleh itu PN telah menolak permohonan izin di bawah s 9 Akta. Oleh itu, tidak ada yang tidak munasabah atau tidak rasional mengapa izin tidak diberikan oleh PN (lihat perenggan 26, 27 & 31).

(2) Sama sekali tidak ada bukti yang menunjukkan bahawa pemegang amanah sedia ada telah melakukan kesalahan. PK yang bijaksana telah salah memahami undang-undang ketika Yang Arif menyatakan bahawa persatuan yang didaftarkan di bawah Akta Pemegang Amanah 1949 tidak termasuk dalam s 9 Akta dan melanggar undang-undang amanah kebajikan awam. Namun, jika pemohon menjadi pemegang amanah, maka tanah amanah tersebut akan dimiliki dan dikendalikan oleh persatuan untuk anggotanya dan bukan untuk orang ramai yang menganut agama Buddha (lihat perenggan 32 & 33).

(3) Tujuan badan perundangan dalam menyusun s 9 Akta adalah untuk memberi kuasa kepada PN dalam melindungi amanah kebajikan daripada penyalahgunaan dan untuk mencegah prosiding yang mempengaruhi dana kebajikan. Prosiding yang dicadangkan oleh pemohon, selain untuk membuang pemegang amanah sedia ada, juga untuk memindahkan tanah tersebut daripada pemegang amanah individu kepada persatuan, yang pasti akan mempengaruhi dana amal yang tidak termasuk dalam s 9 Akta. Tidak ada yang tidak munasabah atau tidak rasional bagi pihak PN untuk tidak memberikan izin, kerana izin tersebut sebelumnya diberikan kepada pemegang amanah sedia ada. Tidak ada alasan yang tidak munasabah atau tidak rasional dalam keputusan PN untuk menolak izin. Keputusan PK yang bijaksana untuk tidak membenarkan permohonan pemohon untuk semakan kehakiman sesuai dengan prinsip undang-undang dan keadilan (lihat perenggan 39 & 42).]

Cases referred to

Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)
Bhikku Daeng & Anor v Maung Shwe Tyn & Anor [1980] 2 MLJ 184, FC (refd)
Cheah Ewe Chong & Anor v Cheah Kee Ee & 15 Ors [1934] 1 MLJ 212 (refd)
Haji Abdullah & Ors v Ibrahim & Ors [1965] 2 MLJ 189 (refd)

A *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9, SC (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) [2019] 1 MLJ 307, CA (refd)

Legislation referred to

B Government Proceedings Act 1956 s 9
Rules of Court 2012 O 53
Societies Act 1966
Trustee Act 1949 ss 40(1), 45, 45(1)(a)

C **Appeal from:** Application for Judicial Review No PA-25–17–04 of 2016 (High Court, Pulau Pinang)

Ravi Chandran (SC Ravi & Assoc) for the appellants.
Shamsul Bolhassan (Rosli Ahmad with him) (Senior Federal Counsel, Attorney
D *General's Chambers) for the respondents.*

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

E

[1] This is an appeal by the appellant/applicant against the decision of the High Court at Penang in dismissing the appellant/applicant's judicial review application under O 53 of the Rules of Court 2012 ('the ROC 2012'). Leave to commence judicial review proceedings was earlier granted by the same court on
F 28 September 2016, which was affirmed by this court (see: *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan)* [2019] 1 MLJ 307).

G **[2]** The appellant/applicant's judicial review proceedings was directed against the refusal of the Respondent to give consent under s 9 of the Government Proceedings Act 1956 ('the Act') to initiate a proceeding for the purpose of appointing an additional or a new trustee in the public charitable trust of Liam Hood Thong Chor Seng Thuan Pulau Pinang ('the Association').

H

[3] We heard the appellant/applicant's appeal on 18 June 2020 wherein at the end of it, after hearing the parties and taking into consideration the written and oral submissions, we dismissed the appeal and affirmed the decision of the High Court. We now give our reason in doing so.

I

[4] For ease of reference the parties will be referred to in this judgment as they were described in the court below.

THE BACKGROUND FACTS

[5] The undisputed facts were well encapsulated in the grounds of judgment of the learned judicial commissioner of the High Court ('learned JC') which we reproduce below with necessary modification.

[6] One Cheah Leong Kean, deceased (the testator) had executed a will and codicil dated 6 May 1941 and a trust deed dated 6 May 1941 wherein the testator had bequeathed the four pieces of land listed below and cash to the amount of RM15,000 for the construction of a Pagoda on the lands and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the Pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the Deity Liam Hood Tong Chor Seng Tuan.

[7] The lands referred to in the will of the testator are as follows:

(a) Geran No 20348 Lot 491;

(b) Geran No 20349 Lot 492;

(c) Geran No 5935 Lot 292; and

(d) Geran No 20273 Lot 963,

all situated in Section 1, North East District in State of Penang ('the said lands').

[8] Since the death of the testator the initial trustees had failed to carry out the building of the Pagoda as per the terms of the trust and the sums of money had been used up completely. On 20 August 1982 an order declaring the said lands to be a public charitable trust was handed down by His Lordship judicial commissioner Mustapha bin Hussain (as His Lordship was then) and that the principles of the cy-pres doctrine be applicable.

[9] Since that order, the said lands had been vested in the names of Robert Teng Lye Hock (deceased), So Miau Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo ('existing trustees').

[10] In the 35 years that have lapsed since the said order, there had been no effort taken by the existing trustees to carry out the wishes of the testator or by way of cy-pres and the said lands have been left vacant.

[11] The Association comprises of the followers of the Buddhist faith and devotees of the said Deity. The Association frequently has religious functions and prayers to the said Deity. There is currently no place of worship for the

Deity and the Association carries out these prayers and other religious and charitable functions at makeshift premises.

[12] The Association had endeavoured to secure funding from third parties to build the said Pagoda. However as a precondition of the said promised funding, the Association needs to be appointed as a trustee, to provide it with the necessary legal standing to execute agreements on behalf of the said trust.

[13] In view of the above, the Association had, vide letters dated 20 November 2014 and 6 July 2015 applied to the honourable Attorney General of Malaysia ('the AG') for consent under s 9 of the Act so that an application can be made to the High Court for the Association to be made a trustee in addition to or to replace the existing trustees.

[14] The AG vide a letter dated 17 February 2016 had refused to give his consent on the grounds that consent had been previously given to the existing trustees on 15 March 2014. Aggrieved by decision of the AG, the said Association filed the judicial review application for an orders of certiorari and mandamus.

AT THE HIGH COURT

[15] The learned JC after considering and perusing the applicant's application and all the affidavits filed, had dismissed the application with costs. The learned JC had identified that the pertinent issue in the application was whether the AG had exercised his function correctly under s 9 of the Act. The burden was on the applicant to show that the AG had acted unreasonably. As long as the exercise of the discretion is reasonable, it must not be interfered with by the court unless there is a misdirection of law, or of irrelevant matters having been taken into consideration or relevant matters had not been taken into consideration or the object of the statute had not been appraised.

[16] The learned JC further found that the applicant does not fulfill the requirement under s 9 of the Act, whereby the provision requires two or more persons to apply for the AG's consent to be trustee in a public charitable trust. Thus, the applicant's application does not satisfy the legal requirements of s 9 of the Act.

[17] The learned JC had relied on the earlier judgment of Mustapha Hussain JC (as he then was) in the same case where His Lordship stated that the trustees of a public charitable trust may at their discretion at any time or times appoint another person or persons to be an additional trustee or trustees but shall not

increase beyond nine. The learned JC was of the view that the recommendation of the existing trustees should be obtained first before additional trustee(s) can be appointed.

[18] The learned JC found that there is no reason to interfere with the administrative decision of the AG. The court found that there is no irrationality or unreasonableness in the AG's decision to refuse consent that warrants the court's intervention. The learned JC further held that the AG had exercised his function correctly under s 9 of the Act.

THE APPEAL

[19] Before us, learned counsel for the applicant posited the same arguments in trying to convince us that the learned JC had fallen into error in dismissing their judicial review application. Learned counsel argued that the learned JC had failed to address his mind to the fact that the applicant had managed to secure funding to enable the construction of the Pagoda which was long overdue thereby fulfilling the wishes of the testator. Learned counsel also argued that there was an entity known as 'Camellia Landscape Sdn Bhd' which was illegally occupying the said lands but the existing trustees and the AG did not do anything about it. Learned counsel submitted that the inaction on the part of the AG was irrational and it was unreasonable for the AG to withhold his consent to appoint the new trustees as proposed by the applicant.

[20] On the issue of the recommendation by the existing trustees before additional trustee(s) can be appointed, learned counsel argued that the indenture to the trust deed and the judgment of His Lordship Mustapha Hussin states that the existing trustees may at their discretion appoint additional trustee(s) with a proviso that the number shall not be increased beyond nine. It was argued that the Indenture merely provides a power to the existing trustees but it does not in any way oust the jurisdiction of the court to do so as provided under s 45(1)(a) of the Trustee Act 1949 ('Act 208') and the decision of the Federal Court in *Bhikku Daeng & Anor v Maung Shwe Tyn & Anor* [1980] 2 MLJ 184.

[21] The third point raised by learned counsel was on the issue of misconduct by the existing trustees, which warrant their removal and replacement by new trustees. Learned counsel argued that even though this issue was premature, but the learned JC had placed great emphasis on the lack of evidence to show any breach of conduct or fiduciary duty by the existing trustees. It was argued that the learned JC erred when His Lordship states that the efforts of the existing trustees had been curtailed by the filing of the various suits to dispute ownership of the said lands. Learned counsel further argued that the existing trustees had breached their fiduciary duties and had not taken

reasonable step(s) to fulfil the wishes of the testator ie. to build a Pagoda on the said lands. Thus, the existing trustees must be removed and replaced by new trustee(s).

[22] On the issue of s 9 of the Act, it was argued that the learned JC had misconceived the law when His Lordship held that the applicant as a society registered under the Societies Act 1966 does not fall within the ambit of s 9 of the Act and will contravene the law of public charitable trusts if appointed as trustees. Learned counsel argued that as trustee, if appointed, the applicant will always be bound by the terms of the trust under Act 208.

[23] On the issue that two or more persons as required under s 9 of the Act, learned counsel argued that this had been fulfilled as the applicant is a society which comprises of seven or more persons. This issue was litigated in the earlier case before this court thus, the respondent is estopped from relitigating the same issue as it is res judicata.

[24] One final issue canvassed by learned counsel for the applicant was on the misconception by the AG that once consent is given, it is akin to the AG agreeing to the appointment or replacement of the existing trustees. Whereas, as submitted by learned counsel, consent under s 9 of the Act is merely consent to initiate proceedings against the existing trustees. The AG can also be joined at this subsequent proceedings. The decision of whether to replace the trustees lies with the court.

OUR DECISION

[25] Now, the issue before us was whether the refusal of the AG to give consent to the applicant to initiate proceeding to add or to replace the existing trustees was irrational and/or unreasonable, for us to either allow or dismiss the applicant's appeal. It is not denied that the applicant made an application to be a trustee in addition to or to replace the existing trustees without the knowledge, consent and/or the appointment of the existing trustees.

[26] After perusing the learned JC grounds, we agreed that the AG's decision in refusing consent was reasonable and rational and was made in full compliance of the law. We also agreed with the learned JC's finding that the applicant had failed to prove mala fide motive on the part of the AG in refusing his consent under s 9 of the Act. Section 9 of the Act provides:

> 9 (1) In the case of any alleged breach of any express or constructive trust for public, religious, social or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney General or two or more persons having an interest in the trust and having obtained the consent in

writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of

(a) asserting any interest or right in the trust property;

(b) removing any trustee;

(c) appointing a new trustee;

(d) vesting any property in a trustee;

(e) directing accounts and inquiries;

(f) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(g) authorizing the whole or any part of the trust property to be let, sold mortgaged, charged or exchanged;

(h) settling a scheme; and

(i) obtaining such further or other relief as the nature of the case may require.

(2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.

(3) Subject to subsections (1) and (2), all suits and proceedings in any court relating to any such trust as is therein referred to or otherwise in which the Government is interested, or in which the interests of the public are affected, or in which if brought interests of the public are affected, or in which if brought in England the Attorney General of England would be, or would be made, a necessary party as plaintiff or defendant, whether by himself or by relation of parties, shall be brought and had in the name of the Attorney General as plaintiff or defendant; and the Attorney General shall have and exercise therein the same rights, duties and powers as the Attorney General of England would have and exercise in England in similar cases so far as the circumstances of Malaysia admit.

(4) The powers of the Attorney General under this section shall, in respect of any trust on the concurrent list, be exercisable by the State Attorney General.

[27] We agreed with the senior federal counsel's submission that the learned JC had correctly made the finding that the AG's decision is rational and reasonable. The learned JC had addressed his mind to the fact that the appellant had secured funding to enable the constructions of the Pagoda to fulfil the wishes of the testator. This can be seen from the learned JC's grounds which we reproduce below:

[43] This court observes that of prime consideration by the court at this judicial review stage is to determine whether an unreasonable or irrational decision has been made by the attorney general. In order to decide, the court reminds itself that the function of the court herein is supervisory and not to exercise an appellate function. the distinct issue is whether the attorney general has exercised his function correctly under s 9 of the GPA.

A [44] It is for the applicant to show that the attorney general acted unreasonably but as long as the exercise of discretion is without improper motive, the exercise of discretion must not be interfered with by the court unless there is a misdirection of law, or of irrelevant matters having been taken into consideration or relevant matters had not been taken into consideration or the object of the statute had not been appraised.

B

[45] Bearing in mind the argument by the applicant that the issues raised should only be deliberated when the court proceeding proper is initiated, it is the court's opinion that in order to determine whether the consent is validly refused by the attorney general, it is unavoidable to inspect and examine the issues that became the foundation of the attorney general's decision.

C

[46] The judgment of Mustapha Hussain has stated that the trustees may at their discretion at any time or times appoint another person or other persons to be an additional trustee or add trustees provided and always that the number of the trustees of those presents shall not increased beyond 9 by virtue of any such appointment as aforesaid.

D

[47] This is in line with the decision in *Bhikku Daeng & Anor v Maung Shwe Tyn & Anor* [1980] 2 MLJ 184 which quotes In *Re Tempest* (1866) LR 1 in which Turner LJ said that the court should have regard to the wishes of the settlor if expressed in the trust instrument or clearly to be collected from it.

E

[48] From this, it is observed that recommendation of the existing trustees should be obtained in order to be new trustees and in this case in the absence of such recommendation (which is not reflected in the affidavits), the AG in not giving consent cannot be deemed to have been acting unreasonably or irrationally.

F

[49] From the affidavits, it is also observed that there have been previous attempts to usurp the existing trustees by the filing of previous suits. The applicant has been mute in not putting forth these attempts in the affidavits filed hence this court deems that the attorney general armed with this knowledge of those attempts which should be within his records and knowledge is justifiable in refusing to give consent.

G

[50] It can also be gathered that the existing trustees have actually been hampered by the existence of the previous suits in their efforts to construct the pagoda hence the applicant's effort to substitute the existing trustees upon this reasoning is not founded upon valid foundations.

H

[51] *The court requires an overwhelming reason in order to interfere with an administrative decision and in this judicial review this court is convinced that such standard has not been fulfilled. This court thus finds that there is no irrationality and unreasonableness in the attorney general's decision to refuse consent that warrants the court's intervention*.

I

[52] Though it is averred that the applicant has the intention to cooperate with the existing trustees, this has not at all been shown and the entry of the tripartite agreement without any consultation with the existing trustees has rather showcased the real intention of the applicant which is not as has been averred pertaining to the willingness to cooperate.

[53] Based on these deliberations, this judicial review is thus dismissed with costs. (Emphasis added.)

[28] The function of the court in exercising the power of judicial review is supervisory, not appellate. The court is not much concern with the decision but only concern with the decision making process. As long as the AG had exercised his discretion without any improper motives, not taking into account irrelevant considerations and took into account relevant considerations and had directed his mind in making the decision to issue the impugned order, and finally the decision was made in accordance with the object of the statute, the decision of the AG should not be set aside (see: *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9).

[29] The learned JC in his grounds had referred to Justice Mustapha Hussain observation to the effect that the existing trustees may, at their discretion at any time or times appoint another person or persons to be an additional trustee or trustees, provided always that the number of the trustees shall not be increased beyond nine. On the power of the court to appoint new or additional trustee or trustees, it is provided under ss 40(1) and 45 of Act 208 which provides as follows:

> 40 Power of appointing new or additional trustees
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> (1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of Malaysia for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor, then, subject to the restrictions imposed by this Act on the number of trustees —
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> (a) the person or person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
>
> (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee,
>
> may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Malaysia, desiring to be discharged, refusing, or being unfit or being incapable, or being a minor, as aforesaid.
>
> 45 Power of Court to appoint new trustees
>
> (1)(a) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
>
> (b) In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who is sentenced to a term of imprisonment or is mentally disordered or is a person of unsound mind or is a bankrupt or is a corporation which is in liquidation or has been dissolved.

A (2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section gives power to appoint an executor or administrator.

B

[30] The Federal Court in *Bhikku Daeng & Anor v Maung Shwe Tyn & Anor* had set out the law with regard to the appointment of trustees by the court, at pp 185–186:

C It might perhaps be convenient at this stage to briefly refer to and set out the law with regard to the appointment of trustees by the court. The court has a general jurisdiction in regard to the appointment of new trustees where the court considers it expedient to do so. Section 45(1)(a) of the Trustee Act provides that in all cases where it is expedient to appoint a new trustee, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, the court may make an D order appointing a new trustee, either in substitution for or in addition to any existing trustee, and whether there is any existing trustee or not at the time of making such order. The general jurisdiction of the court is not affected either by a power in the instrument creating the trust or by the statutory power conferred by s 40 of the Act. In a proper case the court may act notwithstanding these powers (*In* E *Re Fountleroy*). In *In re Tempest* Turner LJ, said that the court in exercising its discretion in appointing a trustee (1) should have regard to the wishes of the settlor if expressed in the trust instrument or clearly to be collected from it: (2) should not appoint a person with a view to the interests of the others; and (3) should have regard to the question whether the appointment would promote or impede the execution of the trust.

F

[31] From the above, it is clear and imperative for the applicant to get the recommendation of the existing trustees before a new or additional trustee can be appointed with the consent of the AG as the Secretary. From the facts, it is G clear that the applicant had failed to obtain that recommendation, thereby the AG had rightly rejected the application for consent under s 9 of the Act. Therefore, we agree that there is nothing unreasonable or irrational as to why consent was not given by the AG.

H **[32]** On the issue of the existing trustees's misconduct which warrant their removal, we wholly agreed with the learned JC that there is no evidence at all to show that the existing trustees had committed any misconduct. On this issue, the learned JC made the following observations:

I [24] Based on the facts presented to this court, there is no shred of evidence to reflect that there has been breach of conduct or breach of fiduciary duty committed by the existing trustees to warrant their removal hence they should be allowed to continue with their current duties.

[25] The applicant avers that the present trustees had failed to construct the promised Pagoda thereby failing to execute the wishes of the donor. However it is

the observation of this court that the efforts of the existing trustees have been curtailed by the filing of various suits to dispute the ownership of the said trust land. In Civil Suit No 21NCvC-4–01 of 2015 heard by the Penang High Court 3, the beneficiaries of the donor had attempted to take back the said trust lands with the beneficiaries also challenging the position of the existing trustees. It was decided 22 March 2019 after a full trial with the suit being dismissed. The various suits elaborated in the affidavits showcase previous attempts to undermine the existing trustees which have led to the delay, if any in the existing trustees need and responsibility to construct the Pagoda.

[26] The AG has been privy to these attempts and suits hence the decision to refuse consent in this matter clearly does not reflect an act of irrationality or unreasonableness.

[33] On the issue of s 9 of the Act, we are of the considered view that the learned JC had misconceived the law when His Lordship held that the society registered under Act 208 does not fall within the ambit of s 9 of the Act and contravenes the law of public charitable trusts. However, we agreed with the learned JC's view that if the applicant becomes the trustee, then the trust land will be owned and controlled by the Society for its members and not for the public at large who profess the religion of Buddhism. At para 28 of his grounds, the learned JC states:

[28] Should the applicant be allowed to so then the trust land will be owned and controlled by the society for the benefit of its members, but not to the public at large who profess the religion of Buddhism. Further, it is also to be noted that the current trustees are not members of the Society and they would be allowed to perform their ritual in the Pagoda. More so, there is likelihood of danger to the property in the event that it is registered under the Society Act 1966. The Society may be dissolved or de-registered by the authorities and thereafter the property shall vest with the Insolvency Department/Registrar of Society, but not with the AG/Ruler. Therefore, pursuant to the indenture, the trust property is meant for the Buddhist communities and it is categorised as public charitable trust which is governed by section 9 of the GPA and the AG is the custodian of public charitable trust and none others.

[34] We now come to the final issue raised by learned counsel for the applicant before us that is on misconception and reasons given by the AG in refusing his consent. Learned counsel argued that there was misconception by the AG that once consent is given, it is akin to the AG agreeing to the appointment of the applicant as the new trustees or replacement of the current set of trustees; whereas the purpose of the consent was just to initiate proceedings against the existing trustees.

[35] Learned counsel further submitted that the reasons stated by the AG in the refusal of consent to the applicant were found in the averment in the various affidavits, which is injurious to the applicant's case as it was only

disclosed after the proceedings had commenced. For this we have sighted the reply letter from the AG dated 17 February 2016 at p 272 of the appeal record Vol 1 Part C. What was stated in the letter was:

> 2. Dimaklumkan bahawa YBhg. Tan Sri Peguam Negara telah memberikan persetujuan di bawah seksyen 9 Akta Prosiding Kerajaan 1956 kepada pemegang-pemegang amanah sedia ada pada 15 Mac 2014.
>
> 3. Sehubungan itu, permohonan tuan tidak dapat dipertimbangkan.

[36] What could be distilled from the contents of the reply letter above was that the AG wanted to keep the existing trustees and do not wish them to be removed and replaced with the new proposed trustees. The AG explained in the affidavits that there is no report made to the enforcement agency against the existing trustees in relation to any breach of misconduct or breach of fiduciary duties to warrant the removal of the existing trustees. Hence the existing trustees are still deemed to be fit and proper persons to carry out its function as trustees. Therefore there is no ground for the removal of the existing trustees which warrants the AG to give consent or approval to the applicant's application under s 9 of the Act.

[37] In *Cheah Ewe Chong & Anor v Cheah Kee Ee & 15 Ors* [1934] 1 MLJ 212, Whitley J said:

> It is important to note that under either method no proceedings could be instituted without the approval in one form or another of the Attorney-General, and the reasons for insisting upon this safeguard in such cases are clearly set out by Eldon, LC, in two of his judgments.
>
> In the case of the *Attorney-General v Green*, 1 Jacob & Walker 303, he observes:
>
> > It is the duty of the Court to take care that as little expense as possible should be incurred by the charity estate.
> >
> > I apprehend the Legislature was very careful when it passed that Act (Romillv's) seeing that some abuses might arise from the proceeding by petition to provide that no one should proceed in that way without the approbation of the Attorney General or the Solicitor-General. Here it was presented without that sanction ... It is clear that the order on the petition must be considered as a nullity.
>
> In *ex parte Skinner*, *In re Lawford Charity*, 2 Merivale 453, he says:
>
> > The intention of the legislature in framing the Act, was to guard charitable trusts from abuse, and, for that purpose, to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the legislature provided for the signature of the Attorney-General, or, in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information.

[38] In *Haji Abdullah & Ors v Ibrahim & Ors* [1965] 2 MLJ 189, Mac Intyre J reiterate the position of the law regarding s 9 of the Act as follows: A

> Section 9(1) of the Government Proceedings Ordinance 1956 lays down the rule that where certain specified reliefs mentioned therein are sought by way of a suit in relation to any alleged breach of any express or constructive trust, or in regard to the administration of any trust for public, religious, social or charitable purposes, the Attorney-General or two or more persons with the written consent of the Attorney-General may institute the necessary proceedings in court. B
>
> Subsection (2) of s 9 merely emphasises the necessity to conform to the provisions of sub-section (1) if any of the reliefs mentioned therein are claimed. C
>
> Subsection (3) lays down the rule that except as to the procedure to be followed in obtaining the reliefs specified in sub-ss (1) and (2), all other suits and proceedings relating to any such trust or otherwise in which the Government is interested, or in which the interest of the public are affected, or in which the interest of the public are affected, or which if brought in England the Attorney-General of England would be a necessary party, shall be brought and had in the name of the Attorney- General as plaintiff or defendant. D
>
> Since the reliefs claimed in the present action are brought on behalf of a charitable trust and are not among the claims specified in sub-s (1), I hold that sub-s (3) applies and that the suit should have been brought and had in the name of the Attorney-General. E

[39] We are of the view that the intention of the Legislature in framing s 9 of the Act is to empower the AG in the protection of charitable trust from abuse and to prevent proceedings affecting the charity funds. The contemplated proceedings by the applicant, other than to remove the existing trustees, was also to transfer the said lands from individual trustees to society, which would definitely affect the charity funds which do not fall within the ambit of s 9 of the Act. We are of the view that there is nothing unreasonable or irrational on the part of the AG not to grant consent, as such consent was previously granted to the existing trustees. F G

[40] The court may interfere when an administrative decision was so unreasonable that no reasonable authority could ever have come to the same decision. However, the court requires something overwhelming to prove such a case. The test is what a sensible person considered it to be unreasonable and not what the court considered it as unreasonable. H

[41] The above principle had been enunciated by Lord Greene MR in the much celebrated case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 at pp 230–231: I

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something

A overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is prove to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

[42] Based on the aforesaid, we were of the view that there is no unreasonableness or irrationality in the decision of the AG to refuse consent. We were also of the view that the decision of the learned JC in not allowing the applicant's application for judicial review was in accordance with the principle of the law, justice of the case and fairness. In the result, we unanimously dismissed the appeal with cost of RM8,000. The decision of the High Court is affirmed.

Appeal dismissed with cost of RM8,000.

Reported by Nabilah Syahida Abdullah Salleh